United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1312

To be argued by
RAYMOND BERNHARD GRUNEWALD

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P/S

United States Court of Appeals

For the Second Circuit

Docket No. 76-1312

UNITED STATES OF AMERICA,

Appellee,

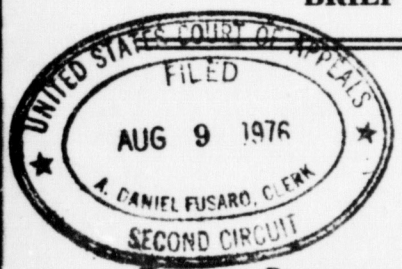
against

MARVIN D. CRISTENFELD,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT



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Preliminary Statement

Marvin D. Cristenfeld appeals from a judgment of conviction entered against him on June 24, 1976, after a jury trial before Hon. Orrin G. Judd in the United States District Court for the Eastern District of New York.

Appellant, in an eight (8) count superseding indictment filed on March 3, 1976, was charged with direct violations of §§ 1951 and 1952, Title 18, U.S.C., § 7206(2), Title 26, U.S.C. and with conspiracies to commit the latter offense. (A5-18)* Appellant was convicted of all charges. On June 24, 1976, he was sentenced to a period of incarceration of one year, to run concurrent on all counts, with all except six months of the incarceration suspended. Additionally, appellant was fined $2,000.

* Reference Key: R–Trial transcript; A–Appellant's Appendix.

Statement of Facts

Marvin D. Cristenfeld, during the time alleged in the offenses charged against him by the indictment, was Chairman of the Democratic Party for the County of Nassau, State of New York. He was also one of the two duly appointed commissioners on the Board of Election for the aforesaid county.

Mr. Cristenfeld, the evidence at trial showed, was actively engaged in his political party. Unfortunately, as a member of the Democratic Party and as designated head of such party, testimony was elicited to the effect that he had participated in a course of conduct to obtain support for his political party which, while it cannot be countenanced, was, in fact, the conduct employed by political parties and representatives at the time the alleged occurrences took place (R.33, R.67-84; A20; A32-39). There was no Federal or State matching funds system at the time, and the political parties were dependent upon contributions in order to politically compete in the public interest and to sustain itself (R.284-285; A86-87).

Although only the testimony of Samuel J. Green was centrally pertinent to the extortion charges contained in the indictment (Counts One and Two), the testimony of several other witnesses was elicited with respect to contributions made to the Democratic Party with reference to the award of public service contracts.

What the evidence showed, in the light most favorable to the government, was that contributions to the Nassau County Democratic Party were made by businessmen, including Green, who, in fact, did receive public service contracts. The contracts were non-bid contracts; no claim was made that any of the contracts central to the allegations contained in the indictment were in any way rigged. The

non-bid contracts involved in the allegations contained in the indictment were personal service contracts (R.56-57; R.67-68; A22-23; A33-34) as to which the County Executive had discretion in the award, and the basis for the award of the contracts were predicated on the qualification and competence of the parties awarded such contracts to perform the work (R.67-68; A33-34). No claim was made by the prosecution in the course of trial that the parties receiving the contracts were incompetent to be awarded such work.

Herbert Pomerantz, the first witness called by the prosecution, testified that in the award of personal service contracts a party was required to be licensed and competent, available to the work, and that the party generally had to make a contribution (R.67-68; A33-34). Mr. Pomerantz further testified that his purpose in placing certain employees of the Democratic Party on his payroll* was a contribution to the Democratic Party (R.112; A49), and that it was understood by him that the people placed on his payroll were to work for the party, and that he was consequently underwriting such services by such mode of contribution (R.105; R.112; A41-49). At such time that such persons placed on his payroll stopped working for the political party, they were immediately terminated from his payroll (R.113-R.114; R.856; A50-51). Moreover, Pomerantz testified that appellant never asked for one penny of money for himself, revealingly stating (R.211; A76a): "I never thought of Mr. Cristenfeld in terms of a public official, only as a party official."

Additionally, Pomerantz stated that Cristenfeld told him that he would get a tax deduction for carrying party workers on his payroll (R.84; A38). Although, Pomer-

* These actions were not central or relevant to the extortion charges, which charges were in counts I and II of the indictment and only concerned appellant's relationship with the witness Green and his company.

antz did testify (R.120; A54) that he realized the deductions taken on his tax returns for payments made to the party workers were fraudulent and illegal deductions, nothing in Pomerantz' testimony suggests that Cristenfeld knew or thought that such deductions would be illegal or otherwise improper. As Pomerantz testified (R.88; A39): "I wanted to carry . . . (Myers) . . . as a necessary business expense." Pomerantz testified that *he* concluded the deduction to be wrongful because no services were performed by the party workers for him (R.120; A54). Otherwise, the prosecution did not submit competent evidence with regard to the impropriety of the deduction, or with regard to Cristenfeld's alleged knowledge thereof.

Donald Joseph Noonan, the second witness called by the Government and one of the individuals to whom payment was rendered by Mr. Pomerantz to underwrite his services to the political party, was supportive of Mr. Pomerantz' testimony. Mr. Noonan testified that fund raising operations of the Nassau County Democratic political party encompassed an enormous amount of time (R.283-284; A85-86). He stated that there were no other means by which a political party could sustain itself other than by fund raising operations (R.284-285; A86-87). It was also in evidence that at the time in issue that there were no matching funds operations whereby either the Federal or County or State Government gave money to political parties (R.285; A87). Fund raising was an integral party of the political system at that time in Nassau County. Without such mode of operations, a political party could not exist nor perform its functions in the public interest (R.283-284; A86-87).

The third witness, Samuel J. Green, was central to the substantive charges under §§ 1951 and 1952, 18 U.S.C. which only involved the alleged occurrences with Green Engineering, a Pennsylvania company with a branch office in

Nassau County, New York. Green's testimony was but a variation of the theme presented by Pomerantz and Noonan.

Green testified that his company opened a Nassau County office, Samuel J. Green Associates, in 1968, because a public service contract was awarded at that time, a contract not involved in the indictment. It was a branch office, the home office was in Pittsburgh, Pennsylvania, and Green regularly travelled between offices. The payroll and certain other work and administrative matters were handled by the home office (R.324-325; A91-92).

Green sought additional work for the company's Nassau branch office; his search included work from private industry. He and the company were not successful (R.331; A98), until he met and spoke to Cristenfeld. Green was told he would obtain contract work from the county, but was expected to make contributions to the Democratic Party (R.339-340; A106-107), which "commitment" was agreed to by Green (R.344; A111). Green testified that he has made such "commitments" to public officials elsewhere (R.342; R.346-350; A109; A113-118), and that he eventually terminated payments in the Cristenfeld "commitment" at a time he thought it was fulfilled and when "there was nothing further we could gain from having (Peltz and Mrozack) on the payroll" (R.374; A120).

The trial court correctly noted, during the course of its charge to the jury, that the tax offenses were separate and apart from the extortion charges. As previously stated, the tax charges with respect to Noonan and Myers revolved about the fact that they were taken as tax deductions when they performed little or no work for Pomerantz. Mrozack was Cristenfeld's secretary as to both of his political positions. As with Noonan and Myers, in terms of Pomerantz,

after asking for more money, Mrozack found herself on the payroll of Green Engineering, the parent company in Pittsburgh. Peltz, Cristenfeld's law partner, who aside from the law partnership practiced law individually (R.586; A168), was retained in March 1970 by Green Engineering, and stated (R.571; A152) that under the terms of the retainer agreement he was available to do whatever work Green Engineering (the parent company) sent to him. The Government position was that in the approximately three-year period in which Peltz was on retainer at $500 a month, Peltz rendered no services for the company and consequently the tax deduction taken for the retainer was violative of the tax laws, and it was alleged that Green and appellant thereby conspired to defraud the Government. Although it was established that Green Engineering had attorneys in Pittsburgh, the fact that Peltz was available as attorney for the New York office during the period of the retainer was pushed aside to establish that Peltz did little or no work for the company. Peltz testified that Cristenfeld never received any of the Green Engineering retainer money and that it was never deposited in or considered by the law partnership (R.587; A169). His testimony was that all the money went into his personal account.

Green's testimony, relevant to the tax charges, was that both Peltz and Mrozack were taken as items of corporate expense (R.387-388; A122-123), and were taken as tax deductions when it was known by Cristenfeld that they performed little or no work. The only evidence concerning the alleged impropriety of the deductions was Green's testimony that the deductions, *in his opinion,* were fraudulent. Green, analogous to the Pomerantz situation, was underwriting the salary of a public worker. Green put Mrozack on the payroll with reference to the contributions required in his line of business (R.374; A120); the agreement reached

with Cristenfeld reflected the nature of the type of contribution expected in the course of the awarding of discretionary public service contracts (R.459; R.481; R.624; R.641-642; A133; A139; A195; A212-213).

Peter Flack's testimony concerned Count Eight of the indictment and revolved about the payment of printing bills of the Nassau County Democratic Party. Flack obtained personal service contracts from Nassau County. (R.688; A220). Flack affirmed that politics was instrumental in the award of the personal service contracts (R.690; A222), and admitted that he approached Cristenfeld towards the matter of contributions to the party (R.747; A241). Flack testified that contributions had everything to do with obtaining personal service contract work (R.731; A240), and that it was he who suggested to Cristenfeld that he could accomplish his contribution by way of picking up the Nassau County Democratic Party printing bill (R.749-750; A243-244). The printing bill expense was run through Flack's business. Flack testified, in a vein similar to Green, in essense, that he "knew" the deduction to be improper. No other evidence was adduced concerning the propriety of the deduction taken by Flack.

Questions Presented

1. Whether the trial court improperly denied defense counsel, as § 3500, Title 18, U.S.C. material, Government attorneys' notes taken at the course of interviews with key prosecution witnesses?

2. Did the prosecution fail to establish an essential element of the tax related offenses contained in the indictment, *i.e.*, false and fraudulent returns as to material matters in violation of § 7206(2), Title 26, U.S.C.? Was the evidence

sufficient to have implicated appellant in the tax related offenses, if it was only shown, in essence, that appellant was aware that individuals performed little or no work for taxpayers who subsequently took business deductions for salary payments made to such individuals, or that a printing bill was paid by a taxpayer taking such payment as a business deduction when appellant knew that the printing company performed no work for the taxpayer directly? Was the evidence sufficient to establish that appellant acted with the specific intent to defraud the Government?

3. Was the crime of extortion, in violation of §§ 1951 and 1952, Title 18, U.S.C., properly vested against the appellant? Did the evidence at trial support the guilty verdict of extortion under Counts One and Two of the indictment? Did the Government have jurisdiction for prosecution of the appellant under the Travel Act, § 1952, Title 18, U.S.C.?

POINT I

The trial court improperly denied disclosure of the government attorneys' witness interview notes as Section 3500 material.

Several times in the course of trial, appellant's trial counsel was denied the disclosure of notes of the Government attorneys made contemporaneously with their interviews of each key witness. When defense counsel first requested the interview notes made by the Government attorneys, with reference to the some eight or nine interviews conducted with the witness Pomerantz, the trial court denied the application on the basis that such notes were nonproducible as "attorney work-product" (R.188; R.192; A59; A63). The witness specifically testified (R.187; A58) that in the course of an interview conducted on July 15,

1975, several months prior to his Grand Jury appearance, the two Government attorneys both took notes. The record also reflects that the witness Pomerantz was interviewed by Government attorneys four times prior to his Grand Jury appearance, and four times afterwards (R.191; A62). Unequivocally, the initial position taken by the trial court that the notes were nonproducible as "attorney work-product" (R.187-188; R.192; A58-59; A63) was contrary to the decision of the Supreme Court of the United States in *Goldberg v. United States*, ——U.S.——, 96 S.Ct. 1138 (1976) where the Court held that a writing prepared by a government lawyer relating to the subject matter of the testimony of a Government witness was not rendered nonproducible solely because a Government lawyer interviewed the witness and wrote the "statement". The opinion of the High Court, set forth in pertinent party (——U.S.——, 96 S.Ct. at 1344):

> "We see nothing in the Jencks Act or its legislative history that excepts from production otherwise producible statements on the ground that they constitute 'work product' of Government lawyers. . . . [T]he plain language of the statute, fully buttressed by legislative history, allows no room for the tendered exception.
>
> "[N]othing in the Act even remotely suggests that 'an agent of the Government' excludes Government lawyers. In any event § 3500(b) requires production of 'any statement (as hereinafter defined) of the witness in the possession of the United States' without any limitation to statements made 'to an agent of the Government' ".

Government counsel, in the case at bar, took the position that their notes were in no respect ratified, adopted or approved by the witnesses and, consequently, persisted in arguing that under the *Goldberg* case their notes were non-producible. Unfortunately, the Government posture, which the trial court adhered to, distorted the *Goldberg* decision. The Court in *Goldberg* was faced with a factual situation where the witness gave testimony that the Government attorneys read back their notes to him at the time of his giving the statements and he approved or corrected the matters read to him. In such context, the Court restricted itself to a determination of whether the Government attorneys' notes may have contained "statements" as defined by § 3500(e)(1), Title 18, U.S.C., which sub-section sets forth:

> "(e) The term 'statement' as used in sub-sections (b), (c) and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him."

The Court held that a writing prepared by a Government lawyer relating to the subject matter of the testimony of a Government witness that has been "signed or otherwise adopted or approved" by the Government witness *is* producible under the Jencks Act. Consequently, examination of the Court's decision in *Goldberg* reveals that its decision was expansive of the Jencks Act in that it brought within the ambit of § 3500(e)(1), Title 18, U.S.C., which applies to "*written*" statements of a witness, Government recordation which is "signed or otherwise adopted or approved" by the Government witness. In the case at bar, only the notes taken with respect to the witness Pomerantz pose inquiry directly under *Goldberg* and the definition set forth by

§ 3500(e)(1),Title 18, U.S.C.[1]; the case more directly poses the inquiry as to whether the statements made by witnesses,

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[1] The record reflects that Pomerantz, within the scope of *Goldberg* decision, may have ratified, adopted or otherwise approved the notes taken by the Government attorneys, as to bring the notes within the definition of a 3500 "statement" under both §§ 3500(e)(1) and (e)(2), Title 18, U.S.C. (R.194; 195; A65-66):

> Mr. Gillen: Mr. Pomerantz during these conversations prior to your testimony, did you discuss with Mr. Kaplan those aspects of what you testified to on the stand that he had taken notes on during your interviews with him?
>
> The Witness: Yes.
>
> Mr. Gillen: Do you accept what he said as a result of his notes?
>
> The Witness: I'm not sure what he said. What do you mean by what he said?
>
> Mr. Gillen: Was he referring to his notes when he was questioning you? As to each successive interview, did Mr. Kaplan have notes of the last interview?
>
> The Witness: I don't know. He had notes.
>
> Mr. Gillen: He had notes. And you made certain agreements, did you not, with Mr. Kaplan concerning whatever notes he referred to?
>
> The Witness: Did I agree to some of the statements that came out of the notes?
>
> Mr. Gillen: Yes.
>
> The Witness: Yes.

Compare, *Goldberg* v. *United States, supra,* 96 S.Ct., at 1343. It was also reflected by defense counsel (R.189; A60) that the Grand Jury testimony of Pomerantz was such that he adopted or denied statements made by one of the Government attorneys taking notes, which suggests that the questions framed were as a result of statements made by Pomerantz at the course of the numerous interviews with the Government attorneys: Defense counsel, poignantly, informed the trial court after its denial of his application (R.196, 197; A67; A68) that the Court's denial "effectively forestalls me from inquiry", which forefronts the Court's statement in *Goldberg* v. *United States, supra,* 96 S.Ct., at 1346:

> "The Act requires disclosure of all statements of use in impeaching witnesses and 'is thus designed to further the fair and just administration of criminal justice' [Cf. *Davis* v. *Alaska, supra*]."

Also, in *United States* v. *Scaglione,* 446 F.2d 182, 184 (5th Cir. 1971), *cert. denied,* 404 U.S. 941 (1971), it was stated: "[T]he witness may adopt or ratify an interview report in a piecemeal manner by response to a number of inquiries as effectually as by a single generalized response."

which were recorded by the Government attorneys present, fall within the definition of a 3500 "statement" as defined by § 3500(e)(2), Title 18, U.S.C., which reads:

> "(2) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement."

The failure of the trial court to consider whether the Government attorneys' notes contained "statements" as defined by § 3500(e)(2), Title 18, U.S.C. clearly was reversible error. The prosecution simply took the position that its notes were never seen, ratified, adopted or otherwise approved by the witnesses and on this isolated basis the trial court agreed and denied defense counsel request for production and disclosure. There is no doubt that the Supreme Court in its *Goldberg* decision did not in any manner limit statements which would fall within the purview or ambit of the definition of a 3500 "statement" under § 3500(e)(2), Title 18, U.S.C. To reiterate, the Court set forth that a statement falling within § 3500(e)(1), would not necessarily have to be a written statement made by the witness, but merely one recorded and either adopted or approved by him.

The Supreme Court of the United States in *Davis* v. *Alaska,* 415 U.S. 308 (1974), stated that limitation of cross-examination in a criminal proceeding results in a grievous loss to a defendant, and that the abrogation of such constitutional right clearly is reversible error. In *Davis* v. *Alaska, supra,* the High Court was faced with a situation where a criminal defendant was estopped from revealing possible bias in a witness' testimony against him. One of the central purposes of the Jencks Act, § 3500, Title 18, U.S.C., (1970),

is to allow a criminal defendant, at trial, material for impeachment in the examination of a witness' testimony against him. Clearly, therefore, an abrogation of the Jencks Act is a breach and limitation of a defendant's express right to full confrontation, as well as a violation of the statute itself. As the Court pointedly set forth in *Goldberg* (——U.S.——, 96 S.Ct. at 1346):

> "The Act requires disclosure of all statements of use in impeaching witnesses 'and is thus designed to further the fair and just administration of criminal justice'."

In *United States* v. *Missler,* 414 F.2d 1293, 1303-4 (4th Cir. 1969), *cert. denied,* 397 U.S. 913 (1970), it was stated:

> "Violations of the [Jencks Act] are necessarily attended by the danger that . . . [the constitutional guarantee of effective confrontation] . . . will be impaired. For this reason, and also because it is ordinarily difficult upon review of a court record to ascertain the value to the defense of a statement withheld, violation of the Act is excused only in extraordinary circumstances. Unless it is perfectly clear that the defense was not prejudiced by the omission, reversal is indicated.[2]

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[2] See, *United States* v. *Cleveland,* v, 477 F.2d 310, 316 (7th Cir. 1973); *United States* v. *Aaron,* 457 F.2d 865, 889 (2d Cir. 1972). As in *Alford* v. *United States,* 282 U.S. 687 (1931), *Smith* v. *Illinois,* 390 U.S. 129 (1968), and *Davis* v. *Alaska, supra,* this Court should refuse to speculate as to the effect production would have had at trial and simply reverse appellant's conviction. The argument that no prejudice inured can only be bred on a series of assumptions regarding the potential effectiveness of cross-examination which neither the Government or the Court is qualified to make. Materials showing inconsistency of testimony of the witness, or which evidenced different emphasis of the same facts, would have been relevant to the cross-examination of the witness. The law is clear that the right of full confrontation is a fundamental right of a criminal defendant. *Kirby* v. *United States,* 174 U.S. 47, 55-56 (1899); *Alford* v. *United*

The adherence of the trial court to the prosecution's posture (R.193; R.411-414; R.600; A64; A128-132; A172-173) was inapposite with the underlying thinking of the Supreme Court's decisions in *Goldberg* v. *United States, supra, Davis* v. *Alaska, supra,* and the Congressional intent in its enactment of the Jencks Act. The denial of defense counsel's request for the Government attorneys' notes on the sole basis that such notes were not ratified, adopted or otherwise approved by the witnesses in the context of the evidence,[3] was reversible error.

States, 282 U.S. 687, 692 (1931); *In re Oliver,* 333 U.S. 257, 273 (1948); *Greene* v. *McElroy,* 360 U.S. 474, 496-7 (1959); *Turner* v. *Louisiana,* 379 U.S. 466, 472-3 (1965); *Pointer* v. *Texas,* 380 U.S. 400, 405 (1965); *Smith* v. *Illinois,* 390 U.S. 129, 131-2 (1968); *Barber* v. *Page,* 390 U.S. 719, 725 (1968); *Davis* v. *Alaska, supra,* 415 U.S. at 315-6. The Supreme Court set forth in its decision in *Jencks* v. *United States,* 353 U.S. 657 (1957), which decision forebore the Congressional legislation:

> "Flat contradictions between the witness's testimony and the version of events given in his reports is not the only tests of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examination process of testing the credibility of a witness's trial testimony (353 U.S. at 667)."

[3] All the Government attorneys' notes produced were sealed (R.235; R.461; R.601; A79; A135; A173). However, the possibility exists as to whether there are additional notes (R.237; A82). In addition to Pomerantz, notes were taken when the witnesses Noonan, Flack and Greene were interviewed. Noonan testified that notes were taken during the course of the four interviews he had with the prosecution (R.280; A84a). Flack also testified that notes were taken, which notes were the basis of questions posited to him at subsequent meetings (R.781; A248). Revealingly, the trial court showed the limited extent of its inquiry, and its misapprehension of *Goldberg* when it only made the following inquiry of the witness Flack (R.788-789; A250-251);

> The Court: All right Mr. Flack, Mr. Flack, did Mr. Kaplan or Mr. Marcus read his notes to you and ask you if they were right?
>
> The Witness: No.
>
> The Court: Did they ever give them to you to read and check?
>
> The Witness: No.
>
> The Court: All right, you may step down.

Resultantly, no sufficient inquiry was made whether the Government notes reflected items of substantially verbatim recitals of the witnesses, which recordations were made contemporaneously with the witnesses' makings of such oral statements. At the very least, under the authority of *Goldberg,* this case must be remanded for such an inquiry to determine whether the Government notes did not, in fact, contain statements as defined by both §§ 3500(e)(1) and (e)(2), Title 18, U.S.C. See, *Clancy* v. *United States,* 365 U.S. 312 (1961); *Palmero* v. *United States,* 360 U.S. 343 (1959).

The trial court erroneously denied disclosure of the Government notes on the limited basis that such notes were not specifically ratified or approved. Consequently, the denial was improper inasmuch as the notes may very well have contained 3500 statements as defined by § 3500(e)(2) Title 18, U.S.C. All nonproducible statements, as considered by the Court in *Goldberg,* may have been excised pursuant to § 3500(c), Title 18, U.S.C. Moreover, in *Ogden V. United States,* 303 F.2d 724, 733 (9th Cir. 1962), it was stated that the trial court had [a]n affirmative duty . . . to secure the information which is necessary to a proper ruling on particular requests for production in light of the statutory purposes . . ."
Additionally, the Supreme Court in *Campbell* v. *United States,* (1) 365 U.S. 85, 92-93 (1961), stated:

> "[d]etermination of the question whether the Government should be ordered to produce government papers could not be made from a mere inspection of the [documents], but only with the help of extrinsic evidence."

The Government attorneys, having spoken to certain witnesses before their Grand Jury appearance, no doubt recorded substantially verbatim responses to important questions posited to the witnesses. § 3500(e)(2), Title 18, U.S.C., does not suggest transcription by qualified professional stenographers; the essential requirement is "substantially verbatim" oral statement(s), "recorded contemporaneously" with its speaking. Resultantly, under the underlying thinking of the Supreme Court's decision in *Davis* v. *Alaska, supra,* the Congressional intent in enacting the Jencks Act and the Supreme Court's decision in the Goldberg case, production of pertinent parts of the Government's notes would be mandated and in full accord with a defendant's procedural due process and Sixth Amendment rights; permitting full examination of a witness who took the stand to testify. Without such disclosure there can be no assurance of a fair trial, and the use of materials producible pursuant to § 3500, Title 18, U.S.C., cannot be conjectured away to have been of no import to defense counsel. See n. 2, *supra.* The extent and nature of the possible prejudice is highlighted by the record at R.884-886; A280-282.

POINT II

The evidence at trial was clearly insufficient to support the guilty verdict on the six tax related counts. No violation of the Internal Revenue Law charged was established.

A. The representations were not false and fraudulent as to material matters within the purview of § 7206(2), Title 26, U.S.C.

The indictment charged appellant with three separate conspiracies to violate the same tax law (Counts Three, Four, Six), and three counts (Counts Five, Seven, Eight) of substantive tax law violations under § 7206(2), Title 26, U.S.C.[4]

The Statement of Facts, at pp. 2-5, reflects that the prosecution's underlying basis for Cristenfeld's implication in these six counts, which charge him with tax related offenses, is the contention that Cristenfeld knew that Peltz, Mrozack, Noonan and Myers performed no work for Green and Pomerantz but, instead, performed work for the Nassau County Democratic party, that he knew a printing bill, paid for by Flack, was that of the Nassau County Democratic party, and that the individuals paying the bills listed the salaries and printing bill as business expenses.

Attorney Peltz, as the evidence at the trial showed, was put on a legal retainer by Green Engineering. The retainer agreement between Peltz and Green Engineering was a viable and enforceable agreement to which Peltz acknowl-

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[4] Section 7206(2) provides in pertinent part:

"§ 7206—Fraud and false statements Any person who—

(2) Aid or assistance—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation . . . of a return, affidavit, claim or other document, which is *fraudulent or is false as to any material matter* . . ." [Emphasis supplied]

edged he "was available . . . to do whatever work they sent to me." (R.[illegible]1; A152) While Peltz knew very little about Green Engineering and was not called upon to do work for Green Engineering, the evidence was not supportive of the fact that appellant directed Green Engineering not to call upon Peltz, who aside from his law partnership with Cristenfeld, practiced individually (R.586; A168). Peltz clearly stated that all Green Engineering retainer moneys went into his personal account. Appellant never received any of the Green Engineering retainer money.

Consequently, first with respect to Peltz, the Government, as a matter of law, failed to prove or establish an essential element of the tax offense charged: a false or fraudulent return by Green Engineering as to a material matter. The essence of the criminal charges in the instant case do not concern a material omission but an allegedly affirmative false statement. See, *United States* v. *Tager,* 479 F.2d 120 (10th Cir.), *cert. denied,* 94 S.Ct. 924 (1973).

Green Engineering's taking of Peltz as a corporate business expense, as a matter of law, cannot be said to be a false declaration. On the contrary, it was in actuality, a true declaration. A viable retainer agreement existed to which Peltz could have at any time have been called upon and obligated to perform legal services for Green Engineering which had a New York office but no local counsel. However, the "false declaration", the Government contends was made, was that Peltz was listed as a corporate legal retainer expense. Appellant's alleged criminality stemmed from the fact that he had arranged such a retainer. However, the listing and taking of Peltz as a corporate expense on the Green Engineering tax return cannot be construed as an affirmative representation that Peltz did "X amount" of work for Green Engineering, and the declaration that Peltz was a business deduction was not a

representation that Peltz in fact performed work for Green Engineering.[5] It was in a sense, at worst, an avoidance, not an evasion, of tax responsibility and one which, *might* have been disallowed in a routine tax audit.

The same situation exists with respect to Noonan, Myers and Mrozack. In *Wells-Lee* v. *Commissioner Internal Revenue,* 360 F.2d 665, 668 8th Cir. (1966), the United States Court of Appeals for the Eighth Circuit remarked:

> "Section 162(a) of the Internal Revenue Code of 1954, 26 U.S.C. (Code), permits a taxpayer to deduct all the ordinary and necessary expenses incurred during the tax year in connection with a trade or business. Although the terms 'ordinary and necessary' have been repeatedly construed and applied, no definite standard can be formulated for determining whether a claimed deduction can qualify as an expense ordinary and necessary in the particular taxpayers' business. *Welch* v. *Helvering,* 290 U.S. 111, 54 S.Ct. 8, 78 L.Ed. 212 (1933); *Iowa Southern Utilities Company* v. *Commissioner Internal Revenue,* 333 F.2d 382 (8th Cir. 1964). *In general a business expense is tested by its normalcy and soundness considered in light of the nature of the taxpayer's trade or business, Byers* v. *Commissioner Internal Revenue,* 199 F.2d 273 (8th Cir. 1952), but the determination of whether an expense is ordinary and necessary and the taxpayer's purpose in making a particular payment are usually questions of fact." [Emphasis supplied]

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[5] The quantum of work performed, under the Internal Revenue Code, is not a factor in considering a payment a business deduction; manifestly, because a qualification of such nature would be against the grain of the contract clause and due process clause of the Constitution in that it would interfere with the free fixation of compensation for services.

The evidence at trial was consistent that, in the award of non-bid public service contracts, the recipients of the contracts expected to and did make political contributions. Consequently, the underwriting of salaries to political party workers, or the payment of political party printing bills were part and parcel of the transactions and in the nature of the payor's trade or business. The evidence was that such payments were normal and expected, and without doubt they were beneficial to the parties making the payments: Green, Pomerantz, Flack all received non-bid public service contracts.

As unwilling as this Court may be to countenance the underlying conduct, the listing of the salaries, paid to Noonan, Myers and Mrozack, as deductions by Pomerantz and Green, as a matter of law, were not affirmatively false or fraudulent representations in violation of § 7206(2), Title 26, U.S.C. Nowhere in the Internal Revenue Code does it definitely state that a person may not be listed and taken as a tax deduction if no services are rendered directly to the taxpayer.[6] Noonan, Myers, and Mrozack all completed W-2 and other employment forms, the employers paid Social Security taxes, and no doubt, Noonan, Myers and Mrozack all paid income taxes to the Government on the moneys received. In this sense it is emphasized to the Court that the prosecution failed to evidence a tax deficiency in the returns in issue: totally failed to offer competent evidence that there were incorrectly claimed expenses on the returns in issue. See, *United States* v. *Celentano*, 391 F.Supp. 1252 (S.D.N.Y., 1975). The prosecution did not offer a letter of assessment by the Internal

[6] Paid "leaves of absence", as they are sometimes euphemistically called, have never been construed to be Revenue Law violations, even when the individuals "loaned" to a political personage, party or cause, performs full-time service to the lendee and the deductions are claimed by the lendor.

Revenue Service, and only evidenced that Green, Pomerantz and Flack, in their opinion, in retrospect, believed the taking of the deductions were fraudulent, apparently, in essence, because little or no work was performed by Noonan, Myers and Mrozack for the persons actually paying their salaries; and, in Flack's case, because the printing expenses listed by him in his return included printing services rendered to the Nassau County Democratic Committee.

It is respectfully submitted that the Court should not construe appellant's knowledge that no requisite services were performed by Noonan, Myers, Mrozack and Brooklyn Letter Service to those listing salary payments to them as business deductions, was a matter which resulted in Cristenfeld's knowingly aiding and abetting or even procuring an affirmative fraudulent and false representation in the tax returns of others. Furthermore, if appellant knew for a fact that Green, Pomerantz and Flack did cause the salary or other payments to be taken in any given year as business deductions on their tax returns—which the record does not evidence—it could not be asserted that because of this knowledge he aided in or procured their making of any alleged material falsehood, and for the additional reason that the listing of such payments as business deductions on a tax return *does not* state or represent that the persons paid, in fact, physically, rendered the salaried services or expense incurred only for the entity taking the deduction but, rather, that it was a business expense.

B. The evidence was not sufficient to support the requirement that appellant acted with specific intent to defraud the Government.

Cristenfeld, as head of the Nassau County Democratic party, received support for his political party as a consequence of the award of public service contracts. In terms

of the payments expected to be made by Green, Pomerantz and Flack, Cristenfeld gratuitously indicated that they could make their contribution by underwriting a party worker's salary and indicated they could, in his opinion, thereby obtain a tax deduction. There was absolutely no showing, but in one collateral and unsupportive instance (R.721; A239), that appellant ever realized that this may not have been a bona fide deduction. Layman logic in tax matters is that payment of salary or any expense connected with a business can be "written off" and is tax deductible, and if not claimed by the one who got the direct benefit, may be claimed by the other who paid for it; and it may very well be the case when viewed that such payments were asserted to be in the normalcy of Green, Flack's, Pomerantz' line of business in seeking non-bid public service contract work.

In *United States* v. *Brown*, 411 F.2d 1134, 1137 (10th Cir. 1969), the Court stated:

> "The critical issue to be considered . . . was not a determination of the acts done by Brown but whether such acts, largely admitted were done with the specific intent to violate sections 7201 and 7206 (1), a necessary element of the charges."

In *United States* v. *Cangiano*, 491 F.2d 906, 909 (2d Cir.), *cert. denied*, 94 S.Ct. 3223 (1974), it was stated by this Court that a conspiracy conviction cannot be upheld unless the Government proves beyond a reasonable doubt that the defendant had the specific intent to commit the substantive offense.

In *Ingram* v. *United States*, 360 U.S. 672 (1959), the United States Supreme Court affirmed the proposition that:

> "Without knowledge, the intent cannot exist. * * * Furthermore to establish an intent, the evidence of

> knowledge must be clear not equivocal. * * * This because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning * * * a dragnet to draw in all substantive crimes." (360 U.S. at 680)

As was stated by the United States Supreme Court in *Scales* v. *United States,* 367 U.S. 203, 224 (1961): "in our jurisprudence guilt is personal . . ." In the instant case, Pomerantz stated he wanted Myers as a business expense; Flack stated he approached Cristenfeld as to the manner in which he wished to make his contribution: by paying the printing bills; Green had total experience in washing funds (R.346-350; A113-117). No knowledge was shown on the part of the appellant that he knew or realized the deductions could be claimed to be improper, let alone, illegal, or that his suggestion that in underwriting a party worker's salary a deduction could be taken, was in bad faith. As in *United States* v. *Brown, supra,* the acts of appellant are largely admitted; the remaining question is whether the evidence supports a specific intent to aid, abet or procure others to violate § 7206(2), Title 26, U.S.C. The only concern Cristenfeld had was in terms of obtaining the expected support for his political party; his indications respecting tax deductions by others were collateral, and nothing shown in the record sufficiently negates that his intent in making such indications was other than with innocent intent. It was Green's, Pomerantz' and Flack's opinion, in retrospect, that the deductions listed were fraudulent, but no sufficient evidence exists that this was Cristenfeld's opinion, or state of mind. Cf. *Hull* v. *United States,* 356 F.2d 919 (5th Cir. 1966). In fact, it is urged that, ironically, under the circumstances, the listing of the respective items was proper. But, in no event, did appellant compel or control the independent actions taken by other individuals with regard to their own tax returns.

Consequently, the prosecution failed to prove that appellant acted in regard to an affirmative material falsification or with specific intent to defraud the Government, and the evidence clearly was insufficient to support the verdict of guilt in the six tax related counts. The trial court erred in denying judgment of acquittal on those counts. See, *United States* v. *Freeman*, 498 F.2d 569 (2d Cir. 1974); *United States* v. *Black*, 497 F.2d 1039 (5th Cir. 1974).

POINT III

The evidence at trial does not support the criminal charge of extortion against appellant in counts one and two and, moreover, count two must fail for want of jurisdiction.

A. There is no proof of payments induced "under color of official right."

In *United States* v. *Nardello*, 393 U.S. 286 (1969), Chief Justice Warren stated that at "common law a public official who under color of office obtains the property of another not due either to the office or the official was guilty of extortion." § 1951(b)(2), Title 18, U.S.C.'s definition of extortion as "the obtaining of property from another, with his consent, induced by . . . fear, or under color of official right" is certainly not free from ambiguity. The statutory language was considered by the Seventh Circuit in *United States* v. *Braasch*, 505 F.2d 139, 151 (1974), and the Court set forth that the crux of the offense was the "use of office to obtain payments". The Seventh Circuit thus found that where police officers used the power and authority vested in them to obtain "protection" money, the activity fell within the purview of § 1951(b)(2). *Accord, United States* v. *Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975).

The indictment alleges, in Counts One and Two therein, that appellant was both Chairman of the Nassau County Democratic Committee and a Commissioner on the Board of Elections at the time he reached a relationship with Green in terms of Green's desiring the obtaining of Nassau County non-bid public service contracts. But it is unequivocally clear that Green dealt with appellant in his capacity as Chairman of the Nassau County Democratic Committee in all respects. The indictment itself, in Counts One and Two supports this fact, by stating: ". . . Marvin A. Cristenfeld, the defendant, as Chairman of the Nassau Democratic County Committee, held himself out to, and was perceived by, Green Engineering Company and Samuel J. Green Associates as having the power to influence the award of contracts for consulting engineering service to be performed for the County of Nassau." Cristenfeld was approached in his "party" capacity and requested contributions to the party as designated head of his political party in Nassau County. As Pomerantz testified: "I never thought of Mr. Cristenfeld as a public official, only as a party official." (R.211; A76a)

It is submitted that appellant, as chairman of his political party in Nassau County, was not a public servant, nor was he holding public office. In *Sulli* v. *Board of Supervisors,* 200 N.Y.S.2d 218 (1960), the court stated that it was clear that the position of chairman of a political party is not a public official. In *Doherty* v. *Meisser,* 321 N.Y.S. 32 (1971), the court held, county committee members are neither federal, state or local officers, nor are they even public officers at all.

It is further submitted that any suggestion that Green thought of, or that the record is supportive of, the fact that Green's relationship was with appellant as a commissioner on the Board of Elections is without foundation in fact.

Any attempt to stretch the relevant facts to implicate appellant of extortion under "color of official right" is an expansion which the trial record does not support. Green did not deal with appellant under his Board of Elections position. The jurisdiction of the statute does not reach with respect to appellant's political party position. Cf. *United States* v. *Meyers*, ——F.S.——, 44 U.S.L.W. 2003, (U.S.D.C. E.Ill., 6/17/75).

B. There is no proof of payments induced by wrongful use of fear.

The second contention of the Government, as to Count One, was that Green made payments, with reference to the award of public service contracts, which were wrongfully induced by Green's fear "of economic loss." This contention was, according to the prosecution, buttressed by Green's statement, in essence, that if he did not make the payments he would not have received the non-bid contracts.

It is submitted that, as a matter of law, the evidence was insufficient to satisfy the requisites of the statutes involved in both Counts One and Two. Appellant did not approach Green; Green, anxious for more contract work, sought out appellant to obtain contracts he not only did not have, nor ever did have, but to which he was not, per se, entitled to. Green very well knew the commitments attendant to the award of all sorts of public service contracts; in fact, his home company as early as 1967 created a wash fund in order to meet such commitments. (R.346-350; A113-117).

The evidence established that, with respect to the appellant, in the award of the contracts there was the expectation of contributions to the Nassau County Democratic Party. The award of the contracts was discretionary, and the sole requirement was competency on the part of the party awarded the contract. Inasmuch as political parties were actively engaged in obtaining contributions, it was

the mode of operation to obtain support for the party in the award of discretionary public service contracts. There was no claim that if Green was not awarded the contracts that the award to any other person would have been an abuse of discretion.[7]

Green actually expected to make payment to the political party; the only matter the record reflects is that he was surprised by the amount. It is apparent that if Green thought that by committing himself to the political contributions he would lose financially, he would *not* have agreed to the payments for he would have had nothing to gain. The bottom line analysis of Green's state of mind is that Green fully expected to make and made his "commitment" with the expectation to profit, and that he acted not through "fear" but in expectation of gain. Such was the case with Green Engineering since at least 1967, a period well prior to the time Green heard or ever met Cristenfeld (R.346-350; A113-117). If Green Engineering was not awarded the contracts, and there was no obligation that he be awarded them and no abuse of discretion if contracts were not awarded to him, he would not realize loss, only

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[7] The evidence at trial showed that individuals making contributions to the Nassau County Democratic party wanted to do so in order to assure receiving the award of contracts, and the evidence was that businessmen making contributions did in fact secure the contracts after agreeing to make contributions. Consequently, the businessmen and the political party in power, in this instance the Nassau County Democratic party, benefited from the contributions. Although it is difficult to countenance the fact that all the parties' gains should be swayed by the fact that contributions were made, it was part and parcel of political operations that contributions be elicited in the award of discretionary personal service contracts. The evidence at trial was in no manner indicative that if Green did not, in fact, agree to make a contribution and did not receive the award of the contracts involved, or didn't receive a contract award simply due to any other form of favoritism, that the denial of the award of the contracts would have been an abuse of discretion or that Cristenfeld's elicitation of contribution was with the intent to commit a criminal act, let alone extortion.

failure to gain. And the only matter that prompted Green's "commitment" was his intent and expectation to profit and to secure the contract.

The fallacy in appellant's conviction for extortion was brought into sharper focus by the testimony of Stuart Friedman, Green's controller (R.608; A180). Friedman testified that it was part of industry practice that various political contributions were made: ". . . there was specific commitments that were made and had to be made to obtain the work, there was no other way to get the work, especially in state or governmental type work. . ." (R.624; A195).

With respect to Green's commitment made in his relationship with appellant, Friedman further stated (R.643; A214):

> "Well, simply that it was irrelevant whether or not power changed or didn't change with political parties. When the commitment was made, it was a commitment to be honored and paid. It was a deal that—as written or struck as if it were written, and it was an agreement. A commitment was honored."

Such conception does not square with the statutory requirement of "fear." (See, R.376; A121).

What the evidence clearly showed is that the political contributions (in various forms) were made, and received by Cristenfeld on behalf of his political party, as part and parcel of the political system in operation at that time. Green did not act out of fear and the entire relationship, the record reflects, was not one of coercion or duress (R.459; R.481; A133; A139). Green sought out Cristenfeld to secure non-bid public service contract work; the record evidences Green had a long history of making "commitments" (R.341; R.346-350; A108; A113-117). If Green can be

deemed to have acted out of fear, under the circumstances involved here, the statutory conception of "fear" will have an overly broad breadth, one the Congress surely did not intend. In sum, Green was not the victim of extortion; he was the willing profferer of a form of political baksheesh. Cristenfeld didn't extort anything from Green; he accepted, in essence, a form of gratuities on behalf of his political party. There was a mutuality of understanding and purpose between Cristenfeld, the holder of political power and Green, the seeker of favoritism. There was no extortion.

Whereby, Counts One and Two should be reversed and dismissed because the evidence fails to support the evidentiary requirements of extortion.

C. There was a substantially incorrect extension of federal jurisdiction into a local alleged crime.

Count Two, charged appellant with extortion, in violation of the so-called Travel Act, § 1952, Title 18, U.S.C., based on the same contentions respecting Green's activities with Cristenfeld, as previously noted.

In *United States* v. *Lightfoot*, 506 F.2d 238 (D.C. Cir. 1974), the Court set forth parts of the legislative history of the Travel Act and the United States Supreme Court's contacts with the statute in *United States* v. *Nardello*, 393 U.S. 286 (1969) and *Rewis* v. *United States*, 401 U.S. 808 (1970) to support its position in reversing a defendant's conviction under the statute for purchasing an automobile in one state with funds derived from illegal activities and taking the automobile to a second state. The Court said (506 F.2d at 240, 241):

> "It appears to us that Congress was seeking to prevent racketeers from engaging in interstate travel to further the purposes of concerted illegal activity.

This purpose was made clear by Attorney General Robert Kennedy's testimony in support of the bill:

'We are seeking to take effective action against the racketeer who conducts an unlawful business but lives far from the scene in comfort and safety, as well as against other hoodlums.

'Let me say from the outset that we do not seek or intend to impede the travel of anyone except persons engaged in illegal businesses as spelled out in the bill . . .

'The target clearly is organized crime. The travel that would be banned is travel "in furtherance of a business enterprise" which involves gambling, liquor, narcotics, and prostitution offenses or extortion or bribery. Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise.

* * * *

'Our investigations also have made it quite clear that only the Federal Government can shut off the funds which permit the top men of organized crime to live far from the scene and, therefore, remain immune from the local officials.' S.Rep. No. 644, 87th Cong., 1st Sess., 2-3 (July 27, 1961).

"In the Supreme Court's first contact with this statute, Chief Justice Warren said:

'The Travel Act formed part of Attorney General Kennedy's legislative proposals to combat organized crime. See Hearings on S.1653-1658, S.1665 before the Senate Judiciary Committee on the Attorney General's Program to Curb Organized Crime and

Racketeering, 87th Cong., 1st Sess. (1961). The Attorney General told the Senate Committee that the purpose of the Travel Act was to aid local law enforcement officials. In many instances the "top men" of a given criminal operation resided in one State but conducted their illegal activities in another; by creating a federal interest in limiting the interstate movement necessary to such operations, criminal conduct beyond the reach of local officials could be controlled.' United States v. Nardello, 393 U.S. 286, 290-291, 89 S. Ct. 534, 537, 21 L.Ed. 2d 487 (1969).

The opinion also noted:

'The Travel Act, primarily designed to stem the "clandestine flow of profits" and to be of "material assistance to the States in combating pernicious undertakings which cross State lines," thus reflects a congressional judgment that certain activities of organized crime which were violative of state law had become a national problem. The legislative response was to be commensurate with the scope of the problem' Id. at 292, 89 S. Ct. at 538. (Footnote omitted.)

"In Rewis v. United States the Court said:

'§ 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another. In addition, we are struck by what Congress did not say. Given the ease with which citizens of our Nation are able to travel and the existence of many multi-state metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are pa-

tronized by out-of-state customers. *In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies. It is not for us to weigh the merits of these factors, but the fact that they are not even discussed in the legislative history of § 1952 strongly suggests that Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State.* In short, neither statutory language nor legislative history supports such a broadranging interpretation of § 1952. And even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, *Bell* v. *United States*, 349 U.S. 81, 83, 75 Ct. 620, 99 L.Ed. 905 (1955).' *Rewis* v. *United States* 401 U.S. 808, 810-811, 91 Ct. 1056, 1059, 28 L.Ed. 2d 493 (1971).

"With these purposes and background for the statute in mind, we find no justification for its application to our instant case." [Emphasis supplied.]

The utilization of the Travel Act is not without limitation. As Judge Friendly noted in *United States* v. *Archer*, 486 F.2d 670, 681 (2d Cir. 1973), a local bribery offense cannot be converted into a federal crime merely because of an incidental interstate telephone conversation between the defendant and federal agents. Cf. *United States* v. *Maze*, 414 U.S. 395 (1974). Of more recent vintage is this

Circuit's opinion in *United States* v. *Brecht*, —— F.2d— (2d Cir. July 16, 1976) where a localized crime, *i.e.*, commercial bribery, was held as not being within the purview of the Travel Act. As this Court noted therein ". . . inquiry into whether the state violation committed by the defendant comes within the scope of the Travel Act depends not upon the nomenclature used, but upon the nature of the violation. The . . . [United States Supreme Court] . . . noted that the Travel Act was primarily designed to stem the clandestine flow of profits to organized crime . . ." *Id.* at .

In the case at bar, the relationship between Green and appellant was in terms of the award of non-bid public service contracts to Samuel J. Green Associates in Nassau County, New York. The prosecution attempted to establish requisite jurisdiction by showing correspondence, telephonic communications, travel between Nassau County and Pittsburgh, Pennsylvania by employees of Green Engineering and Samuel J. Green Associates and by Green himself with respect to the non-bid public service contracts to Samuel J. Green Associates in Nassau County, New York. The prosecution also attempted to establish jurisdiction by showing correspondence, telephonic communication, travel between Nassau County and Pittsburgh, Pennsylvania by employees of Green Engineering and Green, himself, on which occasions it was alleged Green obtained funds for payments towards the local Nassau County Democratic party "commitment". Such interstate nexus was insufficient in terms of the Travel Act prosecution and conviction entered against appellant.

The alleged extortion charged, in the instant case, is, at best, peculiarly a state offense of paying gratuities to a political chairman on behalf of a local branch of a political party, a matter in which a state tribunal should

have exclusive interest, in view of the fact that the thrust of the activity which is alleged to be criminal was purely intracounty let alone intrastate in nature and extent. With the casual intercounty/interstate nexus in mind, it is clear that the bringing of a prosecution against appellant under the Travel Act is a distortion of the Congressional intent in the enactment of the statute. See, *United States* v. *Brecht* and *United States* v. *Lightfoot, Ibid.*

The charge under § 1952, Title 18, U.S.C. is a usurpation of a peculiarly plain localized crime. Federal jurisdiction is unwarranted, as seen by the statute's legislative history. A reading of the Travel Act as broad as the one it is anticipated the appellee will suggest will have the potential of altering sensitive federal-state relationships and would overextend limited federal police resources, in contravention of the statutes legislative history and the Supreme Court's affirmance thereof. *Erlenbaugh* v. *United States,* 409 U.S. 239, 247 N. 21; *Rewis* v. *United States, supra; United States* v. *Brecht, supra; United States* v. *Gibson Specialty Company,* 507 F.2d 446, 451 (9th Cir. 1974); *United States* v. *Lightfoot, supra; United States* v. *Archer, supra.*

CONCLUSION

For all the reasons set forth above, the judgment of conviction should be reversed and the indictment dismissed, or in the alternative, a new trial should be granted.

Respectfully submitted,

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Service of three ③ copies of the within
is admitted this 9th day of August 1976

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